Supreme Court, U.S.
FILED
DEC 16 2005
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No. 04-1618

IN THE

Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER

MIGUEL A. ESTRADA
Counsel of Record
THEODORE J. BOUTROUS, JR.
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

QUESTION PRESENTED

Whether an entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Northern Insurance Company of New York is a wholly owned subsidiary of Maryland Casualty Company, a Maryland corporation; Maryland Casualty Company is a wholly owned subsidiary of Zurich American Insurance Company, a New York corporation; Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation; Zurich Holding Company of America, Inc., is a 99.8711% owned subsidiary of Zurich Insurance, a Swiss corporation (the remaining 0.1289% is owned by ZGA US Limited); Zurich Insurance is a wholly owned subsidiary of Zurich Group Holding, a Swiss corporation; Zurich Group Holding is owned 43% by Allied Zurich p.l.c. and 57% by Zurich Financial Services; and Allied Zurich p.l.c. is a wholly owned subsidiary of Zurich Financial Services; Zurich Financial Services is the only publicly traded parent company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unreported. J.A. 81a-85a. The order of the court of appeals denying the petition for panel rehearing is unreported. *Id.* 86a. The order of the district court is unreported. *Id.* 70a-78a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1333(1). The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on January 28, 2005. J.A. 1a. A timely petition for panel rehearing was denied on March 4, 2005. *Id.* 2a. The petition for a writ of certiorari was filed on June 1, 2005, and granted on October 11, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article I, § 2, ¶ 9(e) of the Georgia Constitution provides:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sov-

ereign immunity is thereby waived and the extent of such waiver.

Article IX, § 1, ¶ 1 of the Georgia Constitution provides, in relevant part:

Each county shall be a body corporate and politic with such governing authority and with such powers and limitations as are provided in this Constitution and as provided by law. . . .

Ga. Code Ann. § 36-1-3 provides:

§ 36-1-3. Every county as body corporate

Every county is a body corporate, with power to sue or be sued in any court.

Ga. Code Ann. § 36-1-4 provides:

§ 36-1-4. When county liable to suit

A county is not liable to suit for any cause of action unless made so by statute.

STATEMENT

1. Chatham County, Georgia, owns, maintains, and operates the Causton Bluff Bridge, a drawbridge that spans the Wilmington River and connects the City of Savannah to neighboring Whitemarsh Island by way of a road known as the Islands Expressway. J.A. 70a. The Wilmington River is part of the Atlantic Intracoastal Waterway, a 1,192-mile course of rivers, bays, and man-made canals that facilitates commercial and recreational navigation along the East Coast of the United States from Norfolk, Virginia, to Miami, Florida. 33 U.S.C. § 1804(6). Congress authorized the creation of the Atlantic Intracoastal Waterway, and provided for it to be maintained by the United States Army Corps of Engineers and administered jointly by the Corps and the United States Coast Guard. *Id.* § 1; 33 C.F.R. §§ 2.36(a)(2), 162.65, 207.160.

The operation of drawbridges over navigable waters, including the Atlantic Intracoastal Waterway, is governed by federal law. *See* 33 U.S.C. § 499; 33 C.F.R. § 117.1 *et seq.*[1] Federal regulations provide that "drawbridges shall open promptly and fully for the passage of vessels when a request to open is given," and that "owners of drawbridges shall ensure that . . . [t]he operating machinery of the draw is maintained in a serviceable condition." *Id.* §§ 117.5, 117.7(b)(2). Federal law also regulates the Causton Bluff Bridge specifically, providing that the bridge "shall open on signal," except during morning and evening rush hours, when "the draw need only open at 7 a.m., 8 a.m. and 5:30 p.m." *Id.* § 117.353(b).

2. On October 6, 2002, James Ludwig was navigating the Wilmington River aboard his sailboat, the *Love of My Life*. J.A. 82a. As he approached the Causton Bluff Bridge, Mr. Ludwig radioed the bridge tender, an employee of Chatham County, and requested that the draw be raised. *Id.* The bridge tender raised the spans, but—just as the *Love of My Life* approached the bridge—one of the spans malfunctioned, slipped out of the raised position, and fell toward the plane of the roadway. *Id.* Before the bridge tender could re-raise the span, the *Love of My Life*'s mast collided with the span, causing the hull to strike the bridge. *Id.* 71a. The *Love of My Life* was severely damaged in the collision and required extensive repairs. Mr. Ludwig and his wife, Carol Ludwig, incurred losses in excess of $130,000 as a result of the collision.

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[1] Indeed, federal regulations specifically preempt all state laws that purport to regulate such drawbridges. *See* 33 C.F.R. § 117.1, note ("Laws, ordinances, regulations, and rules which purport to regulate these bridges and which are not promulgated by the Federal Government have no force and effect.").

The Ludwigs filed a claim with the vessel's insurer, Northern Insurance Company of New York ("Northern"). Northern paid the Ludwigs' claim according to the policy's terms, and then filed a claim with Chatham County as subrogee to the Ludwigs' rights. Chatham County denied the claim, asserting, *inter alia*, that it enjoyed sovereign immunity from suit.

3. Northern filed suit against the County in the United States District Court for the Southern District of Georgia, invoking the court's admiralty jurisdiction. J.A. 9a; 28 U.S.C. § 1333(1). The County answered that Northern's claims were barred by sovereign immunity, and moved for summary judgment on that basis. In its summary judgment motion, the County conceded that "Eleventh Amendment immunity does not extend to counties" because counties are not arms of the State for Eleventh Amendment purposes. J.A. 33a (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The County nevertheless contended that there exists a "[c]ommon law doctrine of sovereign immunity" distinct from "Eleventh Amendment immunity." *Id.* 34a. The County acknowledged that even this so-called common-law immunity "does not extend to lesser entities which are not arms of the state." *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 756-57 (1999)). The County argued, however, that under the old Fifth Circuit's decision in *Broward County v. Wickman*, 195 F.2d 614 (5th Cir. 1952), any "political subdivision of the state" that "exercise[s] delegated state powers" is an arm of the State entitled to common-law sovereign immunity, J.A. 32a, 34a, and that the County could assert such immunity as a defense because its authority to operate the Causton Bluff Bridge was delegated to it by the State of Georgia. *Id.* 33a. The County further argued that, even if common-law sovereign immunity were unavailable, it could rely upon a Georgia constitutional provision granting immunity to "all of [the State's] departments

and agencies." *Id.* 35a-37a (citing Ga. Const. art. I, § 2, ¶ 9(e)).

The district court granted summary judgment to the County on the basis of the County's purported common-law sovereign immunity. *See* J.A. 78a. Framing the "pertinent issue" as "whether the County is entitled to the same immunity as the state," *id.* 75a, the district court largely adopted the County's arguments. Although the district court acknowledged that a county could not assert sovereign immunity under the Eleventh Amendment, it nevertheless concluded that, under the Fifth Circuit's *Wickman* decision, a county could assert "a 'residual sovereign immunity' that arises from common law." *Id.* 74a. The district court interpreted *Wickman* as extending "sovereign immunity from admiralty process" to counties and municipalities when those entities "may be deemed part of the state, either by having exercised power delegated from the state, or because [they are] a political subdivision of the state." *Id.* 76a. The district court reasoned that, because Chatham County was exercising power delegated to it by the State of Georgia when building, operating, and maintaining the Causton Bluff Bridge, the County was a part of the State of Georgia for residual sovereign immunity purposes and therefore entitled to immunity from suit. *Id.* 77a.

4. The Eleventh Circuit affirmed in an unpublished opinion. J.A. 81a. Like the district court, the court of appeals acknowledged that Eleventh Amendment immunity "does not extend to counties," because counties and their governmental bodies are not "'arm[s] of the state' for Eleventh Amendment purposes." *Id.* 83a & n.1 (citing *Vierling v. Celebrity Cruises*, 339 F.3d 1309 (11th Cir. 2003)). The court concluded, however, that the "common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit." *Id.* 83a. The court believed that the existence of such a "residual immunity" was supported by this Court's decision in *Federal*

Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ("*FMC*"), where this Court stated that the "Eleventh Amendment does not define the scope of the States' sovereign immunity" but is merely "one particular exemplification of that immunity." J.A. 83a. And the court of appeals defined the contours of such "residual immunity" by reference to its "far from recent" *Wickman* precedent, which had held that "a city, county or municipal entity" must be deemed a "part of the state"—and thus entitled to sovereign immunity—if it is "exercising power delegated from the State." *Id.* 84a.

To determine whether Chatham County was exercising delegated state authority when operating the drawbridge, the Eleventh Circuit looked to a recent unpublished decision involving the same bridge and nearly identical facts. J.A. 84a (citing *Cont'l Ins. Co. v. Chatham County*, No. 04-10661-FF, 112 Fed. Appx. 3 (11th Cir. July 8, 2004) (reproduced at J.A. 79a)). The district court had found in *Continental Insurance* that Chatham County was an "arm of the State of Georgia" for residual sovereign immunity purposes "because it exercised State power by 'acquiring the land and constructing/operating the public highway and bridge in question.'" *Id.* 84a (quoting *Cont'l Ins. Co. v. Chatham County*, No. 4:03CV038, Order at 6 (S.D. Ga. Jan. 14, 2004) (reproduced at J.A. 71a)). "This case," the Eleventh Circuit concluded, "is no different." *Id.* 85a. Finally, the Eleventh Circuit also relied on its decision in *Kitchen v. CSX Transportation, Inc.*, 6 F.3d 727 (11th Cir. 1993), a diversity case in which the Eleventh Circuit had invoked the Georgia Constitution to conclude that Georgia's "sovereign immunity extends to counties, as subdivisions of the state." *Id.* at 731.

This Court granted certiorari, limited to the question "[w]hether an entity that does not qualify as an 'arm of the state' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit." J.A. 87a.

SUMMARY OF ARGUMENT

This Court has consistently expressed in unequivocal terms that only States and arms of the State can assert sovereign immunity as a defense in federal court. *Alden*, 527 U.S. at 740. Plaintiffs therefore "may bring suit for damages against *all* others, including municipalities and other political subdivisions of a State." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 n.10 (2001) (emphasis added). In holding that Chatham County was entitled to invoke "residual immunity," the court of appeals disregarded this well-established limitation on the scope of sovereign immunity.

The gravamen of the court of appeals' decision is that there are *two* tests available to determine whether an entity is an "arm of the State"—one for claims of "Eleventh Amendment immunity," and another, far less stringent standard for claims of "residual immunity." The essential predicate to this holding—that there exists a "residual sovereign immunity" separate and distinguishable from the sovereign immunity that this Court has addressed in its Eleventh Amendment jurisprudence—is, however, fundamentally mistaken. This Court has repeatedly held that there is only one species of sovereign immunity, which is embodied in the constitutional structure, and that the Eleventh Amendment is merely an exemplification of that immunity. Indeed, the Court recently reiterated that conclusion in *FMC*, 535 U.S. at 753, the very case relied upon by the court of appeals to support the purported coexistence of both "Eleventh Amendment" and "residual" sovereign immunity. Acknowledgment of the fact that sovereign immunity is a unitary doctrine emanating from the constitutional structure is sufficient to dispose of the court of appeals' suggestion that there are dueling tests for assessing whether a political subdivision enjoys sovereign immunity.

Moreover, by holding that sovereign immunity extends to any "city, county, or other municipal entity" that "exercis[es] power delegated from the state," the court of appeals flatly contradicted numerous decisions of this Court holding that such entities do *not* enjoy sovereign immunity. This well-established rule can be traced back at least to 1890, *see Lincoln County v. Luning*, 133 U.S. 529 (1890), and has been applied in the admiralty context since the turn of the twentieth century, *see Workman v. City of New York*, 179 U.S. 552 (1900). And this Court has long since rejected the argument—embraced by the court of appeals—that the exercise of "a slice of State power" suffices to convert a municipality into an arm of the State. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). Indeed, the proposition that "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit," *Jinks v. Richland County*, 538 U.S. 456, 466 (2003), can no longer seriously be questioned.

The court of appeals disregarded this vast body of legal authority—almost none of which it even acknowledged, much less analyzed—and instead relied principally upon the old Fifth Circuit's decision in *Wickman*. Insofar as *Wickman* dismissed as an "assum[ption]," 195 F.2d at 615, this Court's statement in *Workman*, 179 U.S. 552, that "municipal corporations . . . may be sued," *id.* at 565, and ascribed to *Ex parte State of New York, No. 1*, 256 U.S. 490 (1921), the novel proposition that a State's sovereign immunity extends to all "political subdivisions" of the State, *Wickman*, 195 F.2d at 615, *Wickman* was wrong when decided. Even if it were not, however, *Wickman*'s holding cannot possibly survive this Court's more recent and unambiguous statements that counties and municipalities cannot invoke sovereign immunity. *See Jinks*, 538 U.S. at 466 ("municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"); *Alden*, 527 U.S. at 756 ("sovereign immunity . . . bars suits against States but not lesser entities"). Those decisions abso-

lutely foreclose the court of appeals' holding that Chatham County is entitled to sovereign immunity in this admiralty suit.

Finally, to the extent that the court of appeals relied upon Georgia law to conclude that Chatham County is entitled to sovereign immunity, it directly contradicted this Court's decision in *Workman*, which held that the general maritime law preempts all state-law immunities and that state law cannot circumscribe the reach of federal courts' admiralty jurisdiction. 179 U.S. at 563. Indeed, even the Supreme Court of Georgia has acknowledged that state-law immunity cannot shield Chatham County from federal admiralty jurisdiction. *See Hines v. Ga. Ports Auth.*, 604 S.E.2d 189, 191 (Ga. 2004).

The judgment of the court of appeals should be reversed.

ARGUMENT

I. THERE IS A SINGLE DOCTRINE OF SOVEREIGN IMMUNITY THAT ARISES FROM THE STRUCTURE OF THE CONSTITUTION

1. The court of appeals' holding that Chatham County is entitled to "residual" sovereign immunity is premised upon an erroneous reading of this Court's decision in *FMC* and a fundamental misunderstanding of the source and scope of the States' sovereign immunity. The court of appeals' analysis proceeded on the erroneous assumption that there are two distinct categories of sovereign immunity—"Eleventh Amendment immunity" and "common law" (or "residual") sovereign immunity—and that it is possible for a county to be entitled to one type of sovereign immunity but not the other. *See* J.A. 83a (although Eleventh Amendment immunity "does not extend to counties[,] . . . common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit") (footnote omitted). Although early decisions of this Court

regarded the Eleventh Amendment as the source of the States' immunity in federal court, and other decisions suggested that sovereign immunity extends beyond the specific text of that Amendment, *see, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), this Court's modern cases make quite clear that the dichotomy supposed by the court of appeals does not accurately describe federal immunity law.

As has been recognized by this Court's most recent cases, the frequently used phrase "Eleventh Amendment immunity" is "something of a misnomer" because sovereign immunity "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 527 U.S. at 713, 728. Indeed, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Id.* at 713; *see also The Federalist No. 81*, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent .... [T]he exemption ... is now enjoyed by the government of every State in the Union.").

The States "entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). The Constitution preserved that sovereignty by creating a federal government of limited and enumerated powers, by reserving to the States all powers not delegated to the federal government, and by prohibiting the federal government from directly regulating the States. *Alden*, 527 U.S. at 728 (citing U.S. Const. amend. X). These measures established a system of "[d]ual sovereignty" in which the States and the United States each possess sovereign attributes and perform distinct constitutionally prescribed functions. *FMC*, 535 U.S. at 751. Because the "Constitution specifically recognizes the States as sovereign entities," *Seminole Tribe v. Florida*, 517 U.S. 44, 71 (1996), "[t]hey are not relegated to the role of mere provinces or political corporations." *Alden*, 527 U.S. at 715. They instead

"retain the dignity . . . of sovereignty," one of the prerogatives of which is immunity from suit without consent. *Id.*

The Eleventh Amendment merely "evidenc[es] and exemplif[ies]" this "broader concept of immunity[] implicit in the Constitution." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). The Amendment itself is not the source of that immunity. *Id.* at 268. The impetus for the Eleventh Amendment's enactment was this Court's erroneous holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that federal courts possessed jurisdiction over suits against nonconsenting States brought by citizens of another State. *See Alden*, 527 U.S. at 721-22 (acknowledging that *Chisholm* was wrongly decided). The "decision fell upon the country with a profound shock," *id.* at 720 (internal quotation marks omitted), and led to the Eleventh Amendment's prompt introduction and ratification. *Id.* The Amendment restored the pre-*Chisholm* status quo by clarifying that the federal judicial power does not extend to suits against nonconsenting States brought by citizens of another State. *See FMC*, 535 U.S. at 752.

In drafting the Amendment, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified," but chose "only to address the specific provisions of the Constitution that . . . formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (internal quotation marks omitted); *see also Alden*, 527 U.S. at 722 ("Congress acted not to change but to *restore* the original constitutional design") (emphasis added). The Eleventh Amendment thus "does not define the scope of the States' sovereign immunity" but instead is "one particular exemplification of that immunity." *Id.*

2. The court of appeals' distinction between "Eleventh Amendment" and "common-law" immunity is inconsistent with the single, unified body of sovereign immunity law that "exists today by constitutional design." *Alden*, 527 U.S. at

733. Indeed, the decision on which the court of appeals relied to bolster its Eleventh Amendment-residual immunity dichotomy—*FMC*—actually supports the contrary position. *FMC* unambiguously stated that the font of the States' immunity is not the Eleventh Amendment, but instead the structure of the Constitution, which embodies the law of sovereign immunity that predated the Constitution's ratification. 535 U.S. at 753-54.

Because sovereign immunity is a unitary and "fundamental postulate[] implicit in the [C]onstitution[]," *Alden*, 527 U.S. at 729, the principles that this Court has declared when employing the "convenient shorthand" of "Eleventh Amendment immunity" are applicable to *all* sovereign immunity claims. *Id.* at 713. In this case, then, the appropriate question is not whether Chatham County is entitled to either "Eleventh Amendment immunity" or "common-law sovereign immunity," but whether there is any basis for extending to counties the sovereign immunity embedded in the constitutional structure.

3. The fact that this case was brought in admiralty certainly offers no basis for the invention and application of a broader conception of sovereign immunity than that applied by this Court under other, more commonly invoked heads of federal jurisdiction. "[G]eneral maritime law [is] a species of judge-made federal common law," *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (parentheses omitted), and the sovereign immunity principles that govern in the federal question context therefore have equal force in the admiralty setting. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 489 (1987); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982) (plurality op. of Stevens, J.). Indeed, this Court has explicitly rejected the proposition that anything other than traditional federal-law principles of sovereign immunity should be applied in admiralty cases. *See FMC*, 535 U.S. at 767 (declining to create a "maritime commerce" exception to

state sovereign immunity); *see also id.* at 751 n.6 (endorsing the Fourth Circuit's application of traditional arm-of-the-state analysis). Perhaps for that reason the court of appeals did not suggest—and Chatham County did not argue below—that sovereign immunity has a more expansive reach in admiralty cases than in others.

II. THIS COURT HAS CONSISTENTLY REJECTED COUNTIES' SOVEREIGN IMMUNITY CLAIMS

Although "immunity of a truly independent sovereign from suits in its own courts has been enjoyed as a matter of absolute right for centuries," *Nevada v. Hall*, 440 U.S. 410, 414 (1979), there is no comparable historical tradition affording immunity to counties and other political subdivisions. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579 (1946) ("consent [is] not necessary for suits against counties"). To the contrary, there is a "longstanding principle . . . that political subdivisions are not as such sovereign," and therefore cannot claim sovereign immunity. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978); *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 312 (1990) ("this Court has long held that counties and cities are not so integrally related to the State that they are shielded from suit in federal court"). Indeed, this Court has reached this conclusion both in decisions applying the modern conception that sovereign immunity is derived from the Constitution's structure, *see, e.g.*, *Alden*, 527 U.S. at 756, and in earlier decisions applying the now-outmoded notion that the Eleventh Amendment is the source of that immunity, *see, e.g.*, *Lincoln County*, 133 U.S. at 530. The court of appeals' conclusion that Chatham County is entitled to sovereign immunity merely because it purportedly "exercise[s] power delegated from the state" (J.A. 84a) conflicts with this unbroken line of decisions.

A. More Than A Century Of Precedent Holds That Counties Are Not Entitled To Sovereign Immunity

1. In *Jinks v. Richland County*, 538 U.S. 456, this Court—just three Terms ago—unanimously rejected a South Carolina county's argument that sovereign immunity barred 28 U.S.C. § 1367(d) from tolling the statute of limitations on a state-law claim initially filed against the county in federal court but later refiled in state court after the federal court declined to exercise supplemental jurisdiction. *Id.* at 466. The Court held that Congress has the authority to subject a non-consenting county to suit in state court because counties and other "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." *Id.* Thus, although "Congress lacks authority under Article I to override a *State's* immunity from suit in its own courts, it may subject a *municipality* to suit in state court." *Id.* at 465-66 (emphases added; citation omitted); *see also id.* at 466 (Congress possesses "the undisputed power . . . to override state-law immunity when subjecting a municipality to suit under a federal cause of action").[2]

The inherent limits on sovereign immunity recognized in *Jinks* have been clear since at least *Lincoln County*, 133 U.S. 529, where this Court held that a Nevada county that was sued for failure to pay interest on municipal bonds could not invoke the State's sovereign immunity because the "Eleventh

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[2] Even if there were a distinction between "Eleventh Amendment immunity" and "common-law sovereign immunity"—and *Alden* and *FMC* demonstrate that there is not—*Jinks* would still pose an insurmountable obstacle to Chatham County's claim of sovereign immunity. The Eleventh Amendment was not even arguably the source of immunity in *Jinks* because the county was claiming sovereign immunity in *state* court and the Amendment's text applies only to the "Judicial power of the United States." U.S. Const. amend. XI.

Amendment limits the jurisdiction [of federal courts] only as to suits against a State." *Id.* at 530. The Court explained that, "while the county is territorially a part of the State, . . . it is also a corporation created by and with such powers as are given to it by the State." *Id.* As a corporate body, the county had the power to sue and be sued—including in federal court—and it thus was "part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Id.*

Similarly, in *Griffin v. County School Board*, 377 U.S. 218 (1964), this Court held that a federal district court possessed the authority to enjoin county officials from paying tuition grants that funded racially discriminatory private schools and to order the officials to reopen the public school system, which had been closed to avoid court-ordered desegregation. *Id.* at 233. This Court declared that it "has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." *Id.* (citing *Lincoln County*, 133 U.S. 529).

The holdings in *Lincoln County* and *Griffin* have been unhesitatingly reaffirmed in subsequent cases. *See, e.g.*, *Feeney*, 495 U.S. at 312 ("counties and cities are not so integrally related to the State that they are shielded from suit in federal court"); *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998) ("Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity."); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local government"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 n.34 (1984) ("We have held that the Eleventh Amendment does not apply to counties") (internal quotation marks

omitted); *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280 (the "bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties"). The court of appeals did not even attempt to reconcile its holding with these controlling precedents.

2. This Court has similarly accorded dispositive weight to the distinction between sovereign States and nonsovereign municipal corporations in cases considering whether governmental bodies are subject to certain federal causes of action. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that counties and other municipal corporations are encompassed by the statutory term "person" and are therefore subject to suit under 42 U.S.C. § 1983. *Id.* at 690. The Court explained that there is "no constitutional impediment to municipal liability" and explicitly rejected the proposition that sovereign immunity posed an obstacle to suit. *Id.* at 690 n.54. In contrast, the Court held several years later in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), that States are *not* within Section 1983's ambit. In reaching this conclusion, the Court emphasized that "States are protected by the Eleventh Amendment while municipalities are not." *Id.* at 70. *Compare also Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (holding that a State is not a "citizen" for purposes of diversity jurisdiction), *with Moor v. County of Alameda*, 411 U.S. 693, 718 (1973) (it is "firmly rooted in federal law that . . . political subdivisions are citizens of their respective States" and thus subject to suit in diversity) (internal quotation marks omitted).

The same distinction is applicable under the False Claims Act. In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that counties constitute "persons" within the meaning of the Act and are amenable to suit thereunder. *Id.* at 134. The Court reached that conclusion even though it had earlier held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,

529 U.S. 765 (2000), that States cannot be sued under the False Claims Act. In distinguishing *Vermont Agency*, the *Cook County* Court relied upon the "understanding going back at least to Coke that municipal corporations and private ones [are] simply two species of 'body politic and corporate,' treated alike in terms of their legal status as persons capable of suing and being sued." *Cook County*, 538 U.S. at 126 (citation omitted). The Court concluded that "municipal corporations, like private ones, should be treated as natural persons for *virtually all* purposes of constitutional and statutory analysis." *Id.* at 127 (emphasis added; internal quotation marks omitted).

Like Cook County, Chatham County—a municipal corporation chartered under the laws of the State of Georgia—is a "citizen" for purposes of the diversity statute, and a "person" for purposes of Section 1983 and the False Claims Act. By definition, citizens and persons are not sovereigns. As a municipal corporation, Chatham County's very existence "rests in the absolute discretion of the State." *City of Trenton v. New Jersey*, 262 U.S. 182, 186 (1923); *see also Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). Sovereign immunity's "preeminent purpose" of "accord[ing] States the dignity that is consistent with their status as sovereign entities," *FMC*, 535 U.S. at 760, thus does not extend to Chatham County. Unlike Georgia, which "Congress [must] treat . . . in a manner consistent with [its] status as [a] residuary sovereign[]," *Alden*, 527 U.S. at 748, Chatham County—a nonsovereign entity—suffers no affront to its dignity when called to answer for its conduct in federal court.

B. The Mere Exercise Of Delegated State Power Does Not Entitle Political Subdivisions To Sovereign Immunity

1. The Eleventh Circuit not only fundamentally erred in supposing the existence of two distinct doctrines of sovereign immunity law, but it also erred in adopting a watered-down

test for ascertaining which entities are sufficiently aligned with the State to share in the State's immunity. According to the Eleventh Circuit, any political subdivision may share in the State's sovereign immunity merely by showing that it exercises some delegated state power. *See* J.A. 84a. This Court's cases, however, squarely hold that only entities that qualify as "arms of the State" are entitled to sovereign immunity. *See, e.g., Alden*, 527 U.S. at 756. By repeatedly holding—for more than a century—that counties are not immune, this Court necessarily has settled that counties are not "arms of the State." And just as federal law recognizes only a single, unitary doctrine of sovereign immunity that may be claimed by States, so, too, it recognizes only a single inquiry to determine which other entities may share in that immunity—the "arm of the state" test. The Eleventh Circuit's attempt to craft a significantly more expansive, "delegated state power" doctrine of immunity must fail.

Both in cases that fall within the Eleventh Amendment's textual scope, and in cases beyond the Amendment's textual purview, this Court has consistently determined an entity's entitlement to immunity by reference to the same arm-of-the-state factors, including whether the entity's debts are paid by the State, the extent of state control over the entity, and its characterization under state law. *See Lake Country Estates, Inc.*, 440 U.S. at 400-02. In *Regents of the University of California v. Doe*, 519 U.S. 425 (1996), for example—a case within the Eleventh Amendment's textual scope because it involved a diversity action against a government body—this Court concluded that a university was an arm of the State because California was legally liable for any judgments against it. *Id.* at 431.

Contrary to the court of appeals' conclusion, these same considerations govern the arm-of-the-state inquiry in cases outside of the Eleventh Amendment's textual scope. In *FMC*, 535 U.S. 743—an admiralty dispute adjudicated by a federal agency—this Court endorsed the Fourth Circuit's

conclusion that, under the traditional arm-of-the-state framework, the South Carolina State Ports Authority was not an arm of the State. *Id.* at 751 n.6 (citing *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051 (1995)). Moreover, in *Hess*, 513 U.S. 30—a case outside the Eleventh Amendment's literal text because it involved a federal statutory claim brought against a government body—this Court held that the Port Authority Trans-Hudson Corporation ("PATH"), which was formed pursuant to an interstate compact between New York and New Jersey, was not an arm of the State because neither State was responsible for judgments against it. *Id.* at 52. Similarly, in *Mt. Healthy City School District Board of Education*, 429 U.S. 274, another case involving a federal claim against a government entity, the Court held that an Ohio school district was not an arm of the State because it was excluded from the statutory definition of "State" under Ohio law and enjoyed significant autonomy, as evidenced by its extensive powers to issue bonds and levy taxes. *Id.* at 280.

The Court has even applied the *Hess* and *Mt. Healthy* factors in cases outside of the context of sovereign immunity, further demonstrating that there is a single definition of "arm of the State" applicable in *all* settings. In *Moor*, for example, a case in which a California county claimed that it was not a "citizen" for diversity-of-citizenship purposes, the Court held that only an arm of the State could escape the status of "citizen." 411 U.S. at 718. The Court concluded that Alameda County did not qualify as an arm of the State because it was liable for its own judgments, could exercise the powers of taxation and property ownership, and was designated by state law as a "body corporate and politic," which indicated that the county—like all other corporate entities—was capable of suing and being sued. *Id.* at 719.

There is therefore no support for the court of appeals' conclusion that, in cases not implicating the Eleventh Amendment, a more permissive definition of "arm of the

State"—extending to all entities that exercise delegated state power—applies. To the contrary, this Court has long held that the mere exercise of powers delegated by a State is insufficient to imbue a political subdivision with arm-of-the-state status. In *Lake Country Estates*, for example, the Court explicitly rejected the lower court's conclusion that a bistate agency's exercise of delegated state power rendered it an arm of the State. 440 U.S. at 401. Noting its "consistent[] refus[al] to construe" sovereign immunity as "afford[ing] protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power,'" the Court held that the bistate agency was not an arm of the State and was therefore amenable to suit. *Id.*

That conclusion makes eminent sense. The reality is that *all* of the powers exercised by a county are delegated by the State because counties are "merely a department of the State . . . exercising and holding powers and privileges subject to the sovereign will.'" *City of Trenton*, 262 U.S. at 187. Thus, just as Chatham County is operating the Causton Bluff Bridge pursuant to delegated state power, Lincoln County was exercising authority delegated to it by a Nevada statute authorizing the issuance of county bonds, *Lincoln County*, 133 U.S. at 532, and the county in *Griffin* closed its public schools pursuant to a Virginia statute that repealed the State's compulsory attendance laws and delegated school attendance decisions to municipalities. 377 U.S. at 222. The court of appeals' conclusion that any county wielding delegated state powers is entitled to immunity therefore cannot be reconciled with this Court's precedent.

Moreover, affording sovereign immunity to Chatham County on the ground that it exercises power delegated to it by the State of Georgia would profoundly alter the legal landscape by insulating every manner of political subdivision—from counties, to towns, to school boards—from federal causes of action. This Court long ago recognized that federal law would not permit the "denial of justice" that

would result from endowing municipal defendants "with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor." *Workman*, 179 U.S. at 559. Indeed, it would be "'uniquely amiss' . . . if the government itself . . . were permitted to disavow liability for the injury it has begotten." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). There is no plausible basis for radically rewriting this settled area of the law.

Here, it is no longer open to Chatham County to contend that it is an "arm of the State." The question prescribed by this Court presumes that the County cannot make that showing, and for good reason: Nothing about the powers Chatham County may exercise under Georgia law is sufficiently unusual to take Chatham County out of the rule that this Court has followed for more than a century—that sovereign immunity "does not extend to counties." *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280; *see also Feeney*, 495 U.S. at 313 ("[W]hen a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its 'arms.'").[3]

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[3] The County plainly fails any evenhanded application of this Court's arm-of-the-state inquiry. Chatham County alone is liable for judgments entered against it. *See* J.A. 51a, 55a. Georgia exercises no direct control over the County's day-to-day operations, ceding control instead to a directly elected board of commissioners. *See* Ga. Code Ann. § 36-5-22; *see also* Ga. Const. art. IX, § 1, ¶ 3 (providing that each county shall elect its clerk of the superior court, judge of the probate court, sheriff, and tax commissioner). The board exercises broad authority over the County's finances, property, and transportation infrastructure. *See* Ga. Const. art. IX, § 2, ¶ 1 (granting the "governing authority of each county" legislative power to adopt "reasonable ordinances, resolutions, or regula-

C. The Decision Below Offers No Sound Basis For Rejecting This Court's Well-Established Rule That Counties Are Not Entitled To Sovereign Immunity

The principal authority that the court of appeals marshaled in support of its holding was the old Fifth Circuit's 1952 decision in *Broward County v. Wickman*, 195 F.2d 614, which held that a county, as "a political subdivision of the state itself, enjoys [sovereign] immunity" in admiralty actions. *Id.* at 615. *Wickman*, however, is utterly at odds with this Court's decisions in *Alden* and *Jinks*, which squarely hold that counties are not entitled to sovereign immunity. *Alden*, 527 U.S. at 756 ("[S]overeign immunity . . . bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Jinks*, 538 U.S. at 466 ("municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").

Indeed, not only has *Wickman* been superseded by this Court's recent sovereign immunity cases, but it also was demonstrably incorrect at the time it was decided. *Wickman*'s

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tions relating to its property, affairs, and local government"); Ga. Const. art. IX, § 6 (granting "[a]ny county" the power to issue revenue bonds); Ga. Code Ann. § 36-5-22.1 (granting the "governing authority of each county" "exclusive" authority over county property, roads, and taxation). Finally, Georgia law classifies Chatham County as a "body corporate, with power to sue or be sued in any court," *id.* § 36-1-3, and its very existence is dependent upon Georgia's acquiescence, *see* Ga. Const. art. IX, § 1, ¶ 2(c) ("The General Assembly may provide by law for the consolidation of two or more counties into one"). Even the Supreme Court of Georgia has recognized that a "body corporate and politic," liable for its own debts, cannot qualify as an arm of the State. *Hines*, 604 S.E.2d at 194 (internal quotation marks omitted).

holding was premised upon a mischaracterization of this Court's decision in *Ex parte State of New York, No. 1*, 256 U.S. at 498-500, which held that States can invoke sovereign immunity against *in personam* admiralty suits. *Wickman* cites *Ex parte State of New York* for the proposition that "states [and] their *political subdivisions* . . . enjoy the prerogatives of sovereignty to the extent of being immune from suits by individuals." *Wickman*, 195 F.2d at 615 (emphasis added). *Ex parte State of New York*, however, involved only a *State's*—not a *municipality's*—sovereign immunity claim. The question of a political subdivision's entitlement to sovereign immunity was not before the Court, and the decision said absolutely nothing on the subject. *See* 256 U.S. at 500 ("the immunity of a *State* from suit *in personam* in the admiralty brought by a private person without its consent[] is clear") (first italics added).

Had the Court extended sovereign immunity to political subdivisions in *Ex parte State of New York*, it would have been a remarkable event, for even in 1921, the rule that sovereign immunity did not extend to municipalities and counties was well-established. A decade earlier, the Court held in *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636 (1911), that "neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." *Id.* at 645; *see also id.* at 642-43 (sovereign immunity is "a high attribute of sovereignty—a prerogative of the State itself"). The *Hopkins* Court explained that "counties, cities, townships and similar bodies politic . . . cannot rely on freedom from accountability as could a State" because a municipal corporation is merely a "juristic person, whose right to hold and use property [is] coupled with the provision that it might sue and be sued." *Id.* at 645-46; *see also Port of Seattle v. Or. & W. R.R.*, 255 U.S. 56, 71 (1921) ("The Port being a municipal corporation under the laws of Washington . . . could have been sued in the federal court.").

And at the turn of the twentieth century, in still another admiralty case, the Court had held in *Workman* that the City of New York could not invoke state-law immunity as a defense to an admiralty action. 179 U.S. at 565. To reach that conclusion, it was first necessary for the Court to determine whether the City was entitled to sovereign immunity under the United States Constitution. The Court concluded that it was not, holding that, "[a]s a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is *not* limitation taking such corporations out of the reach of the process of a court of admiralty." *Id.* (emphasis added). Having determined that the City was subject to a federal admiralty court's jurisdiction, the Court went on to hold that state-conferred immunity could not defeat that jurisdiction by offering a complete defense on the merits. *Id.*

The *Wickman* decision unconvincingly distinguished *Workman*'s jurisdictional holding as a mere "assum[ption]." 195 F.2d at 615.[4] Even if it were true, however, that the Court had merely assumed that New York City was amenable to suit, *Wickman*'s holding would still be infirm because *Wickman* did not mention—let alone attempt to distinguish—this Court's controlling decisions in *Hopkins* and *Lincoln County*. *Wickman* was thus a slim reed upon which to rest so broad a holding as that found in the decision below.

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[4] Both *Wickman* and the decision below sought to evade *Workman*'s reach by relying upon *Ex parte State of New York, No. 1*, 256 U.S. 490, where this Court distinguished *Workman* on the ground that the case "dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant." *Id.* at 499. Although it is true that the primary issue in *Workman* was whether admiralty law preempted state-conferred immunity, the necessary predicate to that analysis was the Court's determination that municipalities do not enjoy any federal sovereign immunity from suit. *See Workman*, 179 U.S. at 565.

III. GEORGIA LAW CANNOT ALTER THE SCOPE OF FEDERAL ADMIRALTY JURISDICTION

The court of appeals' reliance upon its earlier decision in *Kitchen*, 6 F.3d 727, suggesting that Chatham County is entitled to immunity under the Georgia Constitution is flatly inconsistent with this Court's recognition that "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are . . . controlled by *federal* law." *Owen*, 445 U.S. at 648 n.30 (emphasis added). Indeed, this Court has consistently held that state law cannot limit federal courts' jurisdiction to hear suits against counties.

In *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1868), for example, the Court concluded that an Illinois county was amenable to suit in federal court, even though an Illinois statute purported to restrict claims against counties to the state circuit courts. *Id.* at 122. The Court explained that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Id.* Moreover, in *Chicot County v. Sherwood*, 148 U.S. 529 (1893), the Court held that an Arkansas statute providing that counties could only be sued by prescribed methods in state court did not bar suit against an Arkansas county in federal court because the "jurisdiction of the federal courts is not to be defeated by such legislation." *Id.* at 534.

These holdings apply with equal force in the admiralty setting. The general maritime law is federal in nature, *Yamaha Motor Corp., U.S.A.*, 516 U.S. at 206, and thus only the federal law of sovereign immunity determines whether a government entity can assert immunity as a defense to an admiralty claim. *See Ex parte State of New York, No. 1*, 256 U.S. at 497 (looking to the United States Constitution—not state law—to decide whether a State was entitled to sover-

eign immunity in an admiralty action).[5] Even the Supreme Court of Georgia has acknowledged that a county's state-law immunity cannot shield Chatham County from admiralty liability. *See Hines*, 604 S.E.2d at 191 (holding that the sovereign immunity conferred by the Georgia Constitution does not immunize Georgia political subdivisions from suits in admiralty because "state-conferred immunity is preempted" by federal law).

The Supreme Court of Georgia's recognition that state immunity law presents no barrier to the assertion of admiralty jurisdiction was mandated by *Workman*, which held that a New York law exempting municipalities from liability did not apply in an admiralty action against New York City. 179 U.S. at 590-91. The Court explained that it is "settled that the local decisions of one or more States cannot, as matter of authority, abrogate the maritime law" because doing so would "destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong." *Id.* at 563. If state-law provisions affording municipal corporations sovereign immunity were given effect in admiralty matters, the maritime law governing municipalities' liability would become "one thing in one port of the United States and a different thing in some other port"—a result that it is utterly inconsistent with the objective of uniformity that animates federal maritime law. *Id.* at 558.

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[5] Of course, particular state law may be relevant to the extent that it bears on whether the defendant qualifies as an arm of the State. *See Doe*, 519 U.S. at 429 n.5 ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State . . . is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.").

The Georgia constitutional provision purporting to afford counties sovereign immunity, *see* Ga. Const. art. I, § 2, ¶ 9(e), therefore cannot be given effect in federal court because doing so would contradict the well-settled federal law of sovereign immunity and—by allowing state law to limit the admiralty jurisdiction that Article III confers on federal courts—would undermine the uniformity of the general maritime law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
THEODORE J. BOUTROUS, JR.
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

December 16, 2005

County, for the building and maintenance of bridges over navigable waters. They are collected and reprinted in the appendix to this brief. Additionally, the Act of Congress of March 23, 1906, c. 1130, § 1, 34 Stat. 84 (1906), 33 U.S.C. § 491, is also relevant to this case, reprinted at Resp. Br. App. 1.

STATEMENT

1. Causton Bluff Bridge[1] ("Bridge") is a drawbridge which is owned, operated and maintained by Respondent Chatham County ("County"). J.A. 39a. The Bridge is permanently connected to the roadway of Islands Expressway. Id. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. J.A. 39a, 42a.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. J.A. 39a. Although the parties and lower courts have referred generically to an "intercoastal waterway," the federal regulation that the parties agree applies to the Bridge is entitled "Atlantic Intracoastal Waterway, Savannah River to St. Mary's River." 33 C.F.R. § 117.353(b). J.A. 50a, 54a. The Wilmington River is a part of the Atlantic Intracoastal Waterway and is maintained by the Army Corps of Engineers. See *Williams v. United States*, 581 F. Supp. 847, 848 (S.D. Ga. 1983), aff'd, 747 F. 2d 700 (11th Cir. 1984).

The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intracoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half

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[1] The Bridge has also been known as the Sam Varnedoe Bridge.